UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11540

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In the Matter of:

CHARTER INVESTMENT, INC.,

Debtor.

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United States Bankruptcy Court

One Bowling Green

New York, New York

April 27, 2009

11:02 AM

B E F O R E:

HON. JAMES PECK

U.S. BANKRUPTCY JUDGE

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P R O C E E D I N G S

THE COURT: First of all, let me find out who's here. This is being recorded. Let me just check that the sound's picking up. I received the correspondence from counsel for JPMorgan Chase and the response from Kirkland & Ellis and the five page rejoinder from Simpson Thacher that I received this morning. I haven't received any papers from other parties who are involved in this dispute, including Paul Allen and Vulcan, although I see Paul Allen's counsel. And this is an opportunity for others who are affected by this, including lawyers who represent KPMG, Lazard, Duff & Phelps. If I'm leaving anybody out -- anybody I've left out to -- to talk about the issues.

And let me be clear on a couple of points. Point one, I opted to do this informal conference in a somewhat more formal way because it was obvious to me from the correspondence that this was a shot across the bow of the debtor. That's how I took it. And I take the response back as being a validation, and I took it the right way. I'm not used to receiving single spaced letters at this level of acrimony without having a single item of particularized discovery to deal with. I view this as thematic rather than specific. If I'm wrong in that you can tell me.

For that reason it seemed to me that everybody needed to be held to not a loose informal conference standard but a

tight informal conference standard, which is the reason that I'm doing something unusual. Ordinary they wouldn't be recorded. This is being recorded. Not for record purposes in a formal sense, but for the use of the Court and the parties so to the extent that people say something there's no misunderstanding as to what was said. I assume, because you're all here, there's no objection to doing it this way.

MALE SPEAKER: Not from Charter, Your Honor.

THE COURT: And because the communications I've received have all been designated as highly confidential I'm going to treat what we talk about today not necessarily as highly confidential, because we're just talking about discovery, but to the extent that there are references to documents that may themselves be confidential, just because it's being recorded doesn't mean that it's out for public consumption, and we can appropriately seal, if that's necessary, aspects of this record. That may not be necessary, but I recognize that as a possibility.

Now, for those litigators who may not routinely practice in the bankruptcy court, and for those who do, ordinarily motion practice relating to discovery does not occur absent as a gating process, this kind of an informal conference. I deal what we're talking about today as a prelude to motion practice, should that be necessary, and/or as a means to minimize or suppress that motion practice by helping you

resolve your differences. I'm making no rulings today. And as far as I can tell, based upon what I've read, I'm not capable of making rulings. I can give you some feedback and guidance. But to the extent I do that it doesn't necessarily determine how I'm going to rule to the extent this ripens into a full-blown litigated matter.

I think it makes sense to hear from JPMorgan Chase first, because they initiated this process. And what I'd like to have a clearer sense of, and I did read this morning's correspondence, is what you really hope to accomplish today with this conference and where you see this going, because to the extent that this is just going to be a procedural gate that we need to go through to get to motion practice, I'm going to give you the permission to file a motion pretty quickly, I think. This looks like a real dispute. The problem I have with it is that I'm not going to be able to resolve it so easily without reference to particular documents. So to talk about generically isn't that helpful to me.

So, my first question is based upon the exchange of correspondence what's really the crux of the dispute, and is there a possibility today to avoid a motion practice by bringing the parties closer together or trying to facilitate some understanding, because if there's just going to be motion practice let's find that out sooner rather than later.

MR. FRIEDMAN: Good morning, Your Honor. For the

record, Bryce Friedman from Simpson Thacher for JPMorgan. I appreciate you hearing us in this fashion today. I think it is a productive way to proceed. We are not here simply as a procedural hurdle because we want to file a motion tomorrow and we're asking for permission. We truly believe and, hence, the detail provided in our letter, that feedback or guidance from the Court on some of these issues would be useful. I think we've seen some constructiveness come out of this process already with the debtor having narrowed some of its claims, and we think there are some further ways to go and this conference may help that process.

As an aside, I don't want you to take from the acrimonious nature of our letters anything other than that we're working cooperatively to try and deal with these issues, but there, frankly, seems to be some legal disputes that we're here asking for Your Honor's help on.

The debtor served a privilege log, a revised privilege log with 2,600 or so entries on it. We thought it would be most productive to try and get some high-level feedback from the Court before proceeding directly to a motion practice situation in which we ask the Court to review potentially hundreds of privileged documents. That just doesn't seem like the best use of anybody's time at the moment.

THE COURT: I'll certainly confess that it wouldn't be a good use of my time.

MR. FRIEDMAN: So what we're hoping that we can accomplish is some feedback and guidance that the debtor and we will take back, and maybe we can narrow the issues.

Let me try and explain what we think the four global issues are that we can accomplish today, and then let me present Your Honor with a specific document that sort of raises all of those issues, and that will help, I think, facilitate the conversation. And I gather that this is going to be somewhat of a conversation, and we think that's appropriate.

First of all, there's a remaining issue with respect to the question of whether financial advice provided by KPMG and Lazard can be withheld as privileged. And we view that as sort of a global issue that affects hundreds of entries on the privilege log. It includes KPMG's and Lazard's communications with the debtor and KPMG's and Lazard's work product. Charter has withdrawn, and I think this is one issue that we may be able to resolve today. Charter, as I understand it, has withdrawn its objection, based on accountant-client privilege, for these purposes, and I assume that what comes along with that is a withdrawal of the instruction to KPMG that it shouldn't produce any information to JPMorgan. So that's sort of issue number one that I think, again, with this specific document I'll present I think we can work through some of those issues.

The second issue, I think, is the Vulcan issue. We

view Vulcan, based on the information that's been provided to us to this point for these purposes, as effectively a stranger to Charter, and there has been sort of a grand assertion of a common interest privilege with respect to all communications involving an attorney and Vulcan, and, frankly, we do not see any information to establish that that would be privileged and don't believe it is at this point. Again, that affects multitudes of documents on the log, and rather than do it one by one we thought we could have a conversation about it.

The third issue is Paul Allen. Obviously Paul Allen is the chairman of Charter, and clearly privileged communications were made to Paul Allen. However, we have before us, and at issue, a plan in which Paul Allen is going to receive certain releases and give up certain claims and receive certain payments and purports to have certain claims against Charter, and, clearly, conversation in which they're discussing that adverse situation and those claims, in our view, is probably not subject to properly being withheld on the grounds of privilege.

The fourth issue is a very procedural one and this may just be (skip in audio), and that's really the form of the log. I mean, we've made a request to the debtor that they provide certain information in connection with its log, which we detailed in our letter, that would allow us and, if necessary, the Court, to better assess whether or not the information

being withheld in the log is privileged. For example, we ask who the person is employed by. Who ask who the two in CC was. And we provided a list of five or six categories in our letter, none of which I think are particularly unreasonable, but to this point the debtor hasn't provided. So I think that those are sort of the four things that we think we could touch on today that would be particularly productive.

Now, if you'll allow me I'd like to just pass up, and I've got some extra copies here, and I just want to look at the second page. And if we walk through this this is a copy of the executive summary of Charter's November 14, 2008 board meeting. (skip in audio) self ready, I think, as we sort of just touch on the bullet points here it will illustrate the information that we think is being improperly withheld on the basis of blanket claims of privilege.

So, on November 14th Charter's management convened the special telephonic board meeting, and the directors attended the meeting, and that included Paul Allen along with members of senior management, as well as Lazard, as well as Vulcan, and Mr. Donovan's partner, Mr. Cieri, was there because he'd been retained the day before. And the reason they convened this meeting was because two of the debtors, CCH and CIH, had interest payments on bonds due a couple later, and management needed to talk to the directors about it. At the meeting management told the directors that CC wouldn't make the

interest payment, and we can see that in the first couple of bullet points. And instead of CCH making the payment a company above it called Holdco would send the money down the corporate structure to allow CCH to pay the interest payment. This left Holdco out of cash to make its April interest payments etcetera. This left them unable to pay their interest payment. Now, what management also told the directors, if you look at the third bullet point, and this is where we're getting into the privilege issues, it says that CIH interest payments require distributions from CCH I to CIH, which require CCH I to have a financial (skip in audio). What's being said here is that this means that CCH I can only dividend money up if it has a surplus. Now, the financial (skip in audio) that a dividend in this circumstance would be inappropriate. The bullet point towards the bottom indicates that JPMorgan would claim that the dividend is inappropriate and that CCO is in default under the credit agreement. All of this is the reason that Charter called the meeting, and all of this is the illegal dividend issue that was the subject of the letter. But now Lazard was at this meeting. Lazard gave financial advice. Financial advice at this meeting on the surplus and the illegal dividend issues. And that is reflected in the bullet point that talks about financial advisors. It's reflected in the bullet point that talks about valuation. And at this point Lazard had not yet been retained in the case, had been working on this issue

with the debtor for years, and Lazard's financial advice at that meeting was to ignore the information available to management, and, quote, "the company's CCH subsidiary did not have an adequate surplus at this time". This is pure financial advice, and advice that is at issue in the case, yet Charter has not produced a shred of paper to support this financial advice on the ground of privilege. There's no legal advice here. This is pure financial advice. And we think it absolutely should be produced, and there's no valid privilege objection.

If you look at the disclosure statement it says that "Lazard reviewed certain internal financial and operating data of the debtors, which data were prepared and provided to Lazard by the management of the debtors, met with and discussed the debtors' operations and future prospects with senior management and conducted some other studies, analyses, inquiries, investigations as it deemed appropriate."

Nothing to do with legal advice. I think it is pretty much black letter law that there's no privileges for communications and work product leading to financial advice. All of Lazard's financial advice and communications with management regarding their financial advice should be produced and are not properly withheld on the basis of privilege, even if that financial advice to the company was rendered at the request of counsel. Providing financial advice because counsel

asked you to provide financial advice doesn't turn that financial advice into privileged information.

Now, Charter claims, I think, that Lazard for -- well, let me back up a second. We've gotten seven e-mails that involve Lazard, and on their log there's more than 600 or so that have been deemed privilege. I think they're suggesting that all that Lazard did was to act as an interpreter for Kirkland & Ellis. Now, clearly, prior to Kirkland & Ellis's retention they weren't acting as an interpreter, and prior to Kirkland & Ellis's retention they were providing financial advice, and I think it's pretty clear that the appropriate guidance to Charter at the end of this conversation could be that the financial advice, the work product and the communications behind it and leading to it, provided by Lazard, really in (skip in audio) piece of the dispute in the adversary and the main case, it's not privileged, and it should be produced.

Now, there may be more document by document issues associated with the post-restructuring process. According to Lazard's retention application it was retained for purposes of, effectively, this case towards the end of November, but let me be clear. Financial advice, even after that point, is not privileged, and even if that advice was provided by Lazard at counsel request. And in connection with this let me deal with what I think are a few sleights of hand that the debtor

utilizes to argue that certain of the material that is post-restructuring is privileged.

There's all kinds of entry which talks about Lazard communications, which, and I'm quoting now, reflects legal advice. All kinds of business documents and decisions reflect legal advice. The no smoking sign on the wall reflects legal advice. That doesn't make it privilege. Only communications conveying legal advice or seeking legal advice are privilege. Communications, documents that reflect legal advice, which is, in this day and age, almost every document, are not, by their nature, privilege. So we think we would ask the Court for some guidance on the dozens of documents that have been withheld on the grounds that they reflect legal advice that Lazard prepared and were actually financial advice as well as the hundreds of documents that Lazard prepared regarding debt restructuring. Now, financial (skip in audio) advice that Lazard prepared.

Now, the analysis for KPMG, I think, is easier, but not too much different. KPMG was retained to audit Charter and opine on compliance with JPM's credit agreement, not to provide legal advice to Charter or to support its attorneys. KPMG was referring these same -- reviewing many of these (skip in audio) you were looking at a moment ago at the same time of Lazard. We're guessing, based on some things we've seen, that KPMG even brought in a special valuation unit to look at these issues and it's no coincidence, in our view, that Charter filed for

bankruptcy a few days before they couldn't get KPMG to come to a conclusion that would have helped it with respect to our credit agreement. Again, communications with KPMG, in our view, there's no basis to suggest that they're privileged. This is audit work and not legal work.

Now, I think I'd be remiss if I didn't mention the last bullet point on this executive summary and how it may affect the privilege claims that the debtor is making. It says consequences of not making a distribution and interest payments would likely far exceed the amount of distribution and payment. This is extremely carefully worded, but surefooted compliance with the applicable law here appears to become secondary to other concerns, including avoiding a one billion dollar tax liability for Paul Allen that we mentioned in our papers and is something, again, that I think that the debtor has withheld on the ground of privilege, in our view, inappropriately, because this is a conversation about the financial consequences of the course it took with respect to the surplus issue.

So the first issue, I think, is Lazard and KPMG, and it all, sort of, is illustrated by what you see here on this PowerPoint. I mean, it is, basically, we have been deprived on the ground of privilege, the backup, and the communications leading to the financial advice that is really the heart of the dispute between the parties.

My second issue is the Vulcan issue, and I really

don't have too much to say about it other than at this same meeting Misters McGrath and Temple of Vulcan were present. Mr. McGrath and Temple of Vulcan are not directors of Charter. They appear to be officers of Vulcan. As far as we can tell Vulcan has no -- oh, and I should say that we received minutes of this meeting that are heavily redacted, improperly, in our view, because Mr. McGrath and Temple were there. I mean, I can't even speculate as to what claim of privilege the debtors are making with respect to Vulcan in this circumstance. Vulcan is not Charter. Charter is not Vulcan. The fact that Paul Allen owns Charter doesn't make Vulcan Charter. As you saw in our papers, the debtor's contention, in our view, that any agent of Paul Allen can be present at a meeting goes way too far. Charter's put nothing before us, and maybe we'll hear it today. I would suggest that there's some kind of common interest or anything else that would protect communications made to, or in the presence of, Vulcan.

Now, the related issue is Paul Allen himself. Page 26 of the disclosure statement describes at length the consideration Paul Allen is receiving for giving up claims against Charter. The claims must be pretty good ones because Paul Allen seems to be doing quite well. But Charter's claiming that information about these claims and the settlement leading to these claims is somehow privileged. It's really impossible for us to, and a Court, to analyze the releases that

are -- be giving, and what's going on in the plan if Charter's going to hide behind a privilege for that information. And while there certainly may be a common interest with Mr. Allen in connection with certain issues related to Charter, clearly his disputes with Charter, there's no common interest for Paul Allen.

I mentioned when I started, and this is the last issue, which is the log entries, we have a list of five or six things that we're asking that Charter do, which is provide a job title so we can tell if people are lawyers. For people not employed by the debtor tell us who they're employed by. Identify the twos in the CCs. If they're redacted give us the Bates numbers, and if they're asserting common interest tell us what it is. These are sort of common things that we do in litigation in this district all the time, and I don't think they're particularly burdensome with respect to the items that we ask for.

So I know that's a lot. I think those are the four issues, I think, that we could use some help from the Court on today and hopefully avoid motion practice. And I'll turn the floor over. Thank you for listening, Your Honor.

THE COURT: Thank you.

MR. DONOVAN: Thank you, Your Honor. Well, I think when you started you hit it on the head on two issues. One is it is difficult to frame these issues because what JPMorgan is

asking for is so broad. But I am going to provide the legal basis, which is all they ask for. And, two, I think this is helpful, because I think what Mr. Friedman's presentation has shown is that JPMorgan's misunderstanding of the facts, their arguments have gotten ahead of the facts. So I do think this is helpful, so, hopefully, we can educate them on those facts as they've been presented in this presentation.

So, first, what JPMorgan has started this process requesting is a broad order. And I understand no rulings today, but on that there should be no privilege at all that can be asserted by Charter related to Lazard, Duff & Phelps, Paul Allen, Vulcan and KPMG.

First, with respect to blanket privileges Charter is not asserting blanket privileges with respect to Lazard, Duff & Phelps, Paul Allen or Vulcan. And I told Mr. Friedman that. He knows that. Indeed, with respect to Duff & Phelps, Your Honor, we're asserting no privileges, because as the facts will be developed it'll be understood Duff & Phelps is a third-party valuation service. They conduct, especially in the cable industry, they're especially well known for doing what's called valuations of the fair saleable assets of the cable assets. They're retained on an outside basis. There's no privilege. We're not asserting any.

So that left us with KPMG, where early last week, and I informed Mr. Friedman that basically to avoid this and other

mischaracterizations of the documents that occurred Charter was considering withdrawing, waiving the accountant-client privilege. We now have. We are not going to maintain that in this process, precisely to avoid the mischaracterizations of documents that occurred. And I will get to the one with respect to KPMG.

So against that background, Your Honor, I'd like to walk through each of these, starting with Lazard. JPMorgan argues in their letter this morning that it's kind of refined. They're not now saying you can't assert any privilege with respect to Lazard. They're saying with respect to financial advice. I think that's a bit of a red herring, because we agree on pure financial advice. We have produced those documents, and the relevant time frame for Your Honor that the parties agreed for the production, at this point, is August 1, 2008 forward. And that's important when you get into how much information has Charter produced from Lazard from August 1st to February 28th. And with respect to that, since there are no specific documents alleged, there is case law in this circuit, especially in the bankruptcy context, that you can't have a privilege with a financial advisor. To be sure it is document by document specific, because it is not a broad privilege. But starting with the Second Circuit case in Koval, which I know Your Honor is aware of, including the Calvin Klein case from this district in which Wachtell was using Lazard as a financial

advisor, Judge Rakoff found that it could apply. We're not saying it applies everywhere. But it could apply. And, indeed, in the bankruptcy contest, the Tri-State case that we cite, which is the Middle District of Georgia in the Bankruptcy Court found that the financial advisor is needed, in fact, to interpret and the work product consult with counsel.

So that takes us to, I think it addresses the issue that's been raised today. It is could there be a privilege with respect to Lazard, and there can't be. Now, with respect to Mr. Friedman's arguments that Charter is taking a broad view in trying to assert pure financial advice, that's simply not true. And I would like to go back to this document that Mr. Friedman showed because I think it highlights two points. One, JPMorgan's misunderstanding of the facts and their misunderstanding of what's been produced to them. What was provided to you is a November 14, 2008 telephonic board meeting presentation. And if you look at page 1, the executive summary, it says it's to discuss considerations around November CCH and CIH interest payments. Without getting into the weeks those are two separate payments by two separate entities in the chain of companies between CCI, the parent company, and CCO, the operating company.

What Mr. Friedman said before was he was mixing two points, is he kept saying that there needed to be surplus at this company at the top called Holdco. As the agreement

provides that's simply not true, because as the facts will provide Holdco was able to pay that not through a dividend but through another method sanctioned by the credit agreement. What is required in this circumstances would be a surplus at CCH I, and that is the first sub-bullet under the second bullet, if you see it. And, in fact, the facts as provided here provide that the valuation at CCH I is 2.8 billion dollars. And, in fact, the next bullet that Mr. Friedman referred to, financial advisors, what they did is they did analyze this. They sensitized it to make sure they were in a good condition, and, in fact, the financial advisors said it was reasonable. And the minutes provide that, and we did not redact that. That information has been provided to JPMorgan.

And as we proceed, Your Honor, through this document, we go to page 4 of this document. It's really 4 and 5. This presentation analyzes the surplus at CCH I, which was important for this payment, and if you look at the far right column this shows that there was a 2.8 billion dollar surplus at CCH I. More than sufficient to make that. And if you turn to the next page, Your Honor, this, I think, nails it on the head, is the company was so, kind of, diligent they actually sensitized those numbers. They say well, what happens if our growth rate is lower than we're currently projecting? What happens if multiples go down? And it goes through all these scenarios and shows if you look at the lower box underneath the dotted lines

it shows CCH I had surplus even at the lowest growth rate in the lowest multiple.

And important for our purposes is the question would be is the backup for this produced? You bet it is. It's been produced by company individuals who did these calculations and created this chart. So I think the recurring theme here is JPMorgan's arguments are getting ahead of the facts, especially with respect to Lazard and their involvement.

Now, with respect to has the company claimed privilege over communications including Kirkland & Ellis, Lazard and the company, yes, we have. Was it on a blanket basis? No. But it shouldn't be surprising, especially in a complex high value bankruptcy case like this, that there was a lot of communication, starting in November, especially. And that communication involved legal advice and Lazard acting as either interpreter or its work product that they're within, and that is not a waiver under settled case law to include Lazard, especially on a case that was prearranged with creditors, Mr. Allen and Charter within a short period of time. To be sure, the parties were working hard, so I don't think the number of documents should in any way change the analysis.

So with respect to Lazard, Your Honor, I don't think, at this point, there may be disputes on individual documents, but on the law Charter can assert the privilege, even when Lazard is involved, either under attorney-client or work

product, and to the extent there's a challenge that's a document by document analysis.

We then turn to attorney-client and work product with respect to KPMG. And, Your Honor, this is a much smaller issue, especially with respect to KPMG. There are documents that we have claimed attorney-client or work product over, and it's primarily attorney-client, in which KPMG was consulted by lawyers, and they are within the privilege. And, again, JPMorgan's original argument was there can be no privilege with respect to KPMG. And that's simply not true. Again, the Second Circuit seminal case of Koval is, indeed, regarding accountants. So there can be a privilege. And I know Your Honor has addressed this is one case in which an audit committee was using accountants.

And, to be sure, it has to be a document by document analysis, because most documents with accountants are not privilege. We agree with that. But we don't think that an argument can be made under settled case law that there can be no privilege with respect to KPMG.

So, Your Honor, that brings us to Mr. Allen and the common interest privilege. Here, again, I think it's critical, and I think we're going to have to do this document by document, but JPMorgan argues that Charter is withholding communications with Paul Allen. We have produced lots of communications with Paul Allen. And we've even produced

documents that include Paul Allen's counsel. But there is a common interest agreement between Charter and Mr. Allen in this matter, and that protects certain communications that are already privileged, because, as Your Honor well knows, the common interest privilege is kind of a misnomer. It's actually an exception to the waiver of attorney-client privilege. So when both parties' attorneys are communicating with a common legal interest it's protected. And the only argument, at least in the letter that JPMorgan fronted, was that Mr. Allen and Charter were adverse. We're not sure on what grounds they're arguing that, at what point. But even assuming that's so, even assuming that's so, Your Honor, we cite in our letter the Mortgage and Realty case and the Megan-Racine case. And those cases recognize that the common interest privilege does not require a complete unity of interest. And Megan-Racine says even where a later lawsuit is foreseeable between codefendants, that tends to not prevent them from sharing confidential information for the purpose of the common interest privilege.

So, again, Your Honor, the privilege can apply, and any challenge is going to need to be on a document by document basis.

And, finally, Your Honor, Vulcan is in no different position. Vulcan also has -- is party to a common interest agreement with Mr. Allen and Charter. And with that those same documents, again, protect the waiver of the attorney-client

privilege when those individuals are present.

So on all these, Your Honor, there are multiple categories where these can be privileged, and it'll be a document by document discussion which we still have yet to have whether those need to be raised with the Court.

I do have on the supplemental log, Your Honor, the request for titles and individual employers. They already have that information on organization charts we produced. We're trying to do JPMorgan's work for it, and we're going to give them a letter where these titles came, but they have that information. They can do that themselves. But we are in process of doing that and providing this additional information they've asked for. But I believe they have most, if not all, of that information.

THE COURT: So you're saying the form of log issue is not an issue?

MR. DONOVAN: I don't think it is, Your Honor.

THE COURT: You're agreeing to supplement the log.

MR. DONOVAN: Well, I don't think we -- we basically told them we'd do a letter form on these titles. What he asked for is titles. Who people are employed by, and, I think, two in CC. The two in CC we'll have to supplement the log on for the documents.

THE COURT: All right. But as to this fourth issue, it's off the table?

MR. DONOVAN: Yes, Your Honor.

THE COURT: Okay.

MR. DONOVAN: Okay. While we have this conference, Your Honor, I want to inform, we are filing a request for an informal discovery conference and would request time this week. I'm happy to raise these issues now and see if we can just resolve them. Otherwise we would request time with you this week because we also have concerns. We're going to do it in a short letter, just identifying the issues that we have with JPMorgan's production.

THE COURT: I'm happy with short letters. Anything less than nine pages.

MR. DONOVAN: It will be. But, I guess if I could just preview. One is that JPMorgan, there's a data room similar to what you heard before that we've requested direct access to. Charter historically had access to that data room. The access was severed. We've asked for direct access back to that. It's called an intra-link site. Again, it has information related to the credit agreement. We requested that over a week and a half ago, and even if they're going to produce the documents or have produced it's much easier for financial advisors to look right at the data room. We'd ask that that be done today, if possible.

Also, Your Honor, another issue is both parties have requested 30(b)(6) depositions on document production.

JPMorgan requested a deposition of Charter back on March 26th. We gave them a date for that deposition on March 29th and it, in fact, happened on April 9th. That deposition went for about eight hours in St. Louis on the document production.

Charter has requested a similar deposition of JPMorgan on April 10th, so it's been seventeen days yet, and they still have yet to provide us a date for that deposition. We requested that it would be at the end of this week, before depositions on the merits start next week. We've received no date. We'd ask that that be resolved today.

The pretty important issue on the merits, Judge, is that JPMorgan has not yet produced, and, to date, is unwilling to provide who they'll search or whether they'll search anyone, any of the actual lenders that lended this credit agreement for documents that we've requested. JPMorgan to date has questioned whether they have any obligation to do so. First of all, I think a matter of common sense would say JPMorgan, as agent for the lenders, when they brought the complaint on behalf of themselves and the lenders should have already started that process. But in case there's any ambiguity there's a case in this district called JPMorgan Chase v. Winnick which is 228 F.R.D. 505, which the Court goes through the analysis and says there's no doubt that they have the duty to collect that, and they need to collect from each of the lenders and produce responsive documents. To date, they are

not willing to do that. We want to make sure that gets done.

And the fourth issue, Your Honor, is even within JPMorgan itself JPMorgan has really limited who they'll search. And especially based on the allegations in their complaint and in their letters regarding the interpretation and meaning of the credit agreement there are individuals that JPMorgan has not searched that we think is critical. And one is just, for example, Jim Casey, who's the relationship manager for Charter on high-yield debt offerings. And why is that critical? Well, one reason is in the fourth quarter of 2008 a JPMorgan representative made a presentation to the Charter Board of Directors regarding the high-yield bond debt. Since a lot of the allegations in the complaint are geez, we didn't know the financial status, what was going on within Charter, we think those documents are going to be quite telling to rebut those. But that's just, kind of, one example. So those are four issues that we're going to raise in a letter. Maybe we can resolve today, but we wanted to give you a heads-up that we're filing that.

THE COURT: Here I thought we had eliminated one and we only have three. Now I discover we have seven. Let me just deal with the last part of your presentation first. The intra-links, the 30(b)(6) designation, the duty to search syndicate member documents and the identification of individuals for deposition.

MR. FRIEDMAN: Can I address those? And I'll maybe take some off the table if we need to.

THE COURT: No. No, you can't.

MR. FRIEDMAN: Okay.

THE COURT: I don't want to hear it.

MR. FRIEDMAN: Okay.

THE COURT: I want you to talk about it. I want you to not leave here until you've talked about each one to the point of fatigue, and I want you to work it out. If you can't work it out there'll be a follow-up conference later this week, which can be by telephone if the parties consent, or it can be in this format if you think it's desirable. But just in terms of good practice, while I'm anxious to expedite I'm not anxious to do so in a way that limits the ability of parties to present their positions fully and defend against their positions and also to have an opportunity to meet and confer. And you're going to meet and confer today on that. So I'm not going to address those four in the manner I just have.

Before going into the remaining three issues that -- this and subparts to the three issues -- but the remaining issues that were identified in the original letter from JPMorgan Chase, I simply want to ask, since there are a lot of people in the room and I don't know everybody who's here. Some I do. Some I don't. If there's anyone who represents KPMG, Lazard, Vulcan, Paul Allen, Duff & Phelps, who wishes to be

heard with respect to the informal discovery issues that are being addressed right now, if the answer is no, that's fine. If the answer is yes please identify yourselves, one at a time, and tell me what you have to say.

MR. ZIMET: Your Honor, Robert Zimet. I represent Mr. Allen and Vulcan. May I speak from here?

THE COURT: Yes. Well, why don't you come --

MR. ZIMET: Okay.

THE COURT: Why don't you come closer to the microphone?

MR. ZIMET: I had hoped, maybe expected, not to have to say anything today. And I don't, because counsel don't have to say very much because counsel really did identify from Vulcan and Mr. Allen's point of view why privilege is well taken, why an analysis would have to be done on a document by document basis. And I would only add that there has been -- I've represented Mr. Allen in connection with Charter matters for about eight years, and they have had a joint defense agreement, common interest agreement in place for that time and then renewed one in connection with the issues that led to the Chapter 11 filing. And it is, at times there may be tension. The reason you have a joint defense agreement or a common interest agreement with separate counsel is because there are occasions when the interests may diverge, but the predominant interest is one that is shared by Vulcan, and Mr. Allen as

significant investors and holders in Charter, and Charter itself. And an additional relevant consideration, I think, that deals with the attorney work product privilege where, and I believe many of the documents that have been withheld have been withheld on that basis too, and that doesn't require -- the waiver rules are different. If you're asserting a work product privilege, and you've taken steps to secure the confidentiality of that material where the interest is shared, the fact that somebody may have access to that information who would not technically fall within the same attorney-client role, it's a different situation than when you're dealing with the attorney-client privilege where any stranger to the attorney-client relationship may invalidate the privilege. When you're dealing with the work product immunity it's really a matter of have you taken adequate steps to protect the confidentiality of it and to preclude access to potential adversaries. And that applies here too. And I think that's what I had to say.

THE COURT: Okay.

MR. ZIMET: Thank you.

THE COURT: Thank you.

MR. RUEGGER: Good morning, Your Honor. Arthur Ruegger from the Sonnenschein firm on behalf of Lazard.

THE COURT: Why don't you speak up too?

MR. RUEGGER: I'm sorry.

THE COURT: You're somewhat distant from the microphone.

MR. RUEGGER: But I don't need to be heard for long, Your Honor.

THE COURT: That's great.

MR. RUEGGER: I just do want to say that with all respect to Mr. Friedman, I believe his arguments about financial advice not being privileged paints with too broad a brush, that the authorities are pretty well settled in this circuit and elsewhere that when counsel to the debtor requests financial advice from the financial advisors for the purpose of rendering legal advice to the debtor, that that financial advice that only goes to counsel, and, perhaps, to the debtor also, is properly privileged. The problem it presents to us is we have to determine for each document or each piece of financial advice did counsel request it. What was the purpose of it? And so that's why, as Mr. Donovan pointed out for Charter, it's a document by document issue. But Mr. Donovan is absolutely correct, and it's been Lazard's practice over the years, and it has been observed by the course, that the advice requested by counsel, brought only back to counsel to give that legal advice, is privileged. So if that issue requires further briefing in front of Your Honor we're happy to participate, and if the issue comes up on a document by document basis we're happy to explain why we think certain documents will be

privileged.

THE COURT: Okay. That's it? Let me make a few comments, with the understanding that these are comments. I'm not prejudging anything.

First of all, as to the original request for this conference, my recollection of the original letter from JPMorgan Chase was that it was principally addressed to the notion of alleged stonewalling on the part of Charter and the suggestion that Charter was withholding from production significant quantities of otherwise discoverable material by asserting a blanket privilege of either attorney-client privilege, accountant-client privilege or common interest privilege.

I don't know whether or not there has been a change in position as a result of the passage of time, a misunderstanding of the position, or whether or not there has been a change in position as a result of the exchange of correspondence and the fact that we've a conference here today. But as I understand what I've heard Charter is not asserting on a blanket basis any privileges but, rather, is taking the position that these privileges and/or doctrines apply on a document specific basis which may, incidentally, apply to whole categories of documents, so that it may be that there are multiple types of documents that fit within a basket that would, in their view, be privileged and not subject to production. But when I use

the document specific label I'm merely referring to identifiable material that you can categorize fairly as either being or not being subject to an applicable privilege.

So, at least as to the assertions that got us to this place in the first instance of blanket privilege, it's my understanding that's not truly before me at this moment. If I have a misunderstanding on that we can readdress that. I'm going to go now to the various points that have been identified that are still open and that may, indeed, become the subject of motion practice.

As to the privilege applicable to either Lazard or KPMG, it's my understanding that Charter does not assert, under Missouri law or any other applicable law, that there is a financial advisor or accountant privilege, and, instead, is arguing that on a document by document or category of document basis that where Lazard and KPMG have provided specific advice in consultation with counsel or to support the work of counsel, that the applicable case law here, including the Koval case, might apply, and to the extent that these entities are acting as interpreters of complex data to assist counsel in rendering the advice of counsel (loud noise in audio) Charter, that such information would be properly subject to a claim of privilege.

I agree to the extent that such a showing can be made on a particularly document by document or category to document basis, and, incidentally , I view this as intensely fact

specific and would require a showing that goes well beyond the parsing of a document that by its very terms is labeled executive summary. And I think we recognize that executive summaries are almost by definition somewhat misleading. This is complicated material, highly complex with top line headlines in the executive summary. Those who read executive summaries and assume that they understand something are executives. Those who actually understand what's going on are probably the people who report to the executives. And I suspect that there's a lot more here than meets the eye on one page. And so I take no position for present purposes as to whether any individual document, including this apparent PowerPoint that was prepared in anticipation of the November 14, 2008 board meeting, fits within any category. Nor do I take any position at this moment, although I recognize the materiality of the information, as to whether information concerning financial surplus and means to affect the distribution within the chain of companies should be fairly withheld from production or should be exposed to production. This is a complicated subject as to which everybody in the room knows more than I do, because you've been spending time on this that preceded even the filing date of this bankruptcy case.

I don't know whether or not what I've just said is helpful or not, but it's certainly my view of the law, and I was happy to be reminded of my decision in Soprano (ph.), which

I'd forgotten, and I reread. It's very well written. And very helpful to me to be reminded of what I had written once before. All kidding aside, I believe that this is probably a privilege which under the facts of this case may be difficult to assert on a broad basis, because the notion of KPMG as auditor and Lazard as financial advisor working either independently, or in conjunction with, or at the request of counsel, may turn out to be a difficult proposition to support, particularly where Lazard, and I'm focusing on Lazard in particular because of the reference to the November board meeting PowerPoint, may have been involved in significant activity to advise the board. It was not filtered through counsel nor designed to advise counsel but rather designed to do what Lazard does, which is to provide independent advice. And I will admit to having years and years ago been involved in advisory situations where Lazard was at the table through Mr. Millstein. It's happened. It can't be avoided if you've been in this practice long enough. And I know how Lazard conducts itself, and I know how counsel generally conducts itself. And there are certain instances when there's clear connection and confidential advisory work that goes on which might well be subject to a proper claim of privilege, and then there are other examples where people run free in their separate directions. I don't know what the facts are here. And I suspect that the facts will determine the outcome.

As to KPMG, really, the same proposition applies, although it may be an even more challenging assertion given the fact that they are at least categorized as being auditors. I don't know whether or not that audit function, which, presumably, at least contributed to the implied surplus calculation on page 4 of the document, is something that was done independently or through counsel. If it was done independently it may become difficult to assert a privilege. If it was done at the direction of and then through counsel, I don't know. But it's also my understanding that it hasn't been redacted, and to the extent that it suits Charter's purposes I suspect a lot of information will be presented that shows that there's plenty of surplus there anyway.

As far as the Vulcan/Paul Allen common interest for a joint defense privilege is concerned, I don't really know enough to comment on this. I would note for the information of counsel that on Friday Chief Judge Bernstein, in a matter in the Quigley bankruptcy, issued a decision which addresses the common interest doctrine and other issues of privilege, which I commend to counsel to review and which represents a case that, while not binding on me is, nonetheless, in my judgment a carefully prepared and well reasoned decision on these subjects, the most recent articulation that anybody would look to.

Whether or not the common interest privilege applies

either to Vulcan or to Paul Allen in this case I don't know, but it certainly might. And I'm not persuaded, but I am aware of the fact that counsel for Vulcan came forward and said we've been doing this for eight years. The problem with common interests, and joint defense agreements in general, is that they are subject to potential mischief and abuse. That's not to say that there's any example of that here. I know that when I have been in the past, and not as a judge but as a lawyer, involved in matters where similarly situated parties have worked together to develop a common strategy, we attempted to craft joint defense or common interest agreements and did so with a hope and a prayer that they would work. Happily, mostly they're not tested. This is a case where it may be tested.

In the end, it's a question of whether or not there's legitimacy to the assertion and the reasonableness of the positions being asserted now in terms of withholding documents from production. I know that Mr. Allen is a person who has been closely associated with Charter for a very long time, that he has economic interests that are affected by this that are potentially adverse to that of the company and its creditors. But it's also clear that in this restructuring context matters were developed in consort with him.

I don't know enough yet to know which issues are issues that would be subject to the categorization but they're really adverse and that it's not appropriate to declare that

they're subject to a common interest, and which issues are subject to the common interest agreement. But I'm also aware of the case law that indicates that the fact that one may have adverse interest does not take away the ability to assert legitimately that the common interest doctrine applies. Again, it's a case specific assessment that needs to be made, and I can't do it thoughtfully on the basis of what's been presented so far.

Now, let me make a more general comment, which is the atmosphere of the case. This is a very high-level, very sophisticated, deep ticket, complex bankruptcy case being handled by the best law firms around. That's obvious. And I don't mean to suggest that people shouldn't be litigating this as aggressively and zealously as the important subject matter deserves. But I sensed in the correspondence, I must tell you this, and I know that there was a statement at the outset well, I shouldn't think that you guys aren't working constructively together. I'm sure you are. But I sensed in the correspondence a posture on both sides. To the extent you're trying to gain advantage by doing that, you're not. It's not working. That doesn't mean that these aren't entirely legitimate disputes that, to the extent they can't be resolved through the thoughtful activity of lawyers working constructively to reach a good goal, will not end up in court and be resolved as promptly as I can resolve them. But for

this litigation to work it needs to have a somewhat more civil spirit. That's not to say that any cheap shots were landed or that anybody attempted a cheap shot. But I sense a tone in the correspondence that, candidly, I don't like. I don't like nine page letters. I don't like discovery disputes. No judge does. And lawyers don't like them either because in the end the doctrines that we're talking about have meaning to the extent they are applied and asserted in good faith. My working premise is that with the quality of the lawyers that we have here this is being prosecuted on both sides, on all sides, in the utmost good faith. To the extent that a discovery dispute is not resolved through your own efforts and ends up in front of me, and I sense that there is extreme lawyering going on here, the taking of a position that really isn't justified, it will not serve your ultimate interests. So please take that into account.

What more can I do to be helpful? As to the last four points I think what I can probably do to be helpful is not let you leave. You'll stay here for a while longer and talk about it. Yes, sir?

MR. ELKIND: Your Honor, David Elkind of Ropes & Gray. We're counsel, proposed counsel for the creditors' committee, the official committee of unsecured creditors.

THE COURT: Do you have a position on any of this?

MR. ELKIND: I'm sorry?

THE COURT: Do you have a position?

MR. ELKIND: No, not on this. I'm not articulating a position on this. But we have a separate matter relating to the protective order which we can address in a very short letter to Your Honor. We're talking with debtor's counsel, and rather than engage in motion practice, which is unnecessary, I think, we feel there ought to be, as regard the creditors' committee, one or two tweaks in the protective order, which we're going to ask for by letter. And we'll copy all of the parties on this, and we'd like to handle it that way. I think it's the most cost-effective.

THE COURT: That's fine. As you can probably tell I'm interested in your working things out if you can. If you can't, I'm interested in having prompt hearings. So hopefully you'll work things out.

Now, as far as the last, the intra-links, the 30(b)(6), the production of documents within the syndicate and identification of witnesses and by moving this process along, hopefully you'll reach an agreement on that, and if you can't reach an agreement on it, or if you think it may take some number of days before you can reach an agreement on it, just, please, before you leave, just tell my chambers' staff where you stand. And then in terms of scheduling I leave it to you whether or not these matters are matters that are best heard in person on the record or whether or not they can be effectively

heard on a telephone conference. I'm sensing that this command performance, having everybody show up in court, works well the first time. I'm not sure it works so well the second time. And so I see no reason to have eye contact with each of you to talk about what I view as relatively refined issues of dispute. So I suggest that we might do that on a telephone conference, unless you really want to come down here, which is fine. I also leave it to you whether you want to have it recorded. We can always have a court reporter present for purposes of recording it. I leave that to you as well. As far as timing on that I could do it later this week, on Wednesday, if you need that time. And we'll refine the time of day that is most convenient for the most of you. Okay?

MALE SPEAKER: Thank you, Your Honor.

THE COURT: Good luck with the rest of this.

(Proceedings Concluded at 12:10 PM)

C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

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